

DATE: June 9, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-23133

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Nygina T. Mills, Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated November 15, 2002 which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline G (Alcohol Consumption) and Guideline E (Personal Conduct). Administrative Judge Charles D. Ablard issued a favorable security clearance decision on January 5, 2004.

Department Counsel appealed the Administrative Judge's favorable decision. The Board has jurisdiction under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

The following issues have been raised on appeal: (1) whether the Administrative Judge's conclusion that Applicant's alcohol abuse had been mitigated was arbitrary, capricious, or contrary to law; and (2) whether the Administrative Judge erred by applying Guideline E Mitigating Condition E2.A5.1.3.1; and (3) whether the Administrative Judge erred by finding Applicant did not falsify a security clearance application. For the reasons that follow, the Board affirms the Administrative Judge's decision.

Scope of Review

On appeal, the Board does not review a case *de novo*. Rather, the Board addresses the material issues raised by the parties to determine whether there is factual or legal error. There is no presumption of error below, and the appealing party must raise claims of error with specificity and identify how the Administrative Judge committed factual or legal error. Directive, Additional Procedural Guidance, Item E3.1.32. *See also* ISCR Case No. 00-0050 (July 23, 2001) at pp. 2-3 (discussing reasons why party must raise claims of error with specificity).

When the rulings or conclusions of an Administrative Judge are challenged, the Board must consider whether they are: (1) arbitrary or capricious; or (2) contrary to law. Directive, Additional Procedural Guidance, Item E3.1.32.3. In deciding whether the Judge's rulings or conclusions are arbitrary or capricious, the Board will review the Judge's decision to determine whether: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to

a mere difference of opinion. *See, e.g.*, ISCR Case No. 97-0435 (July 14, 1998) at p. 3 (citing Supreme Court decision). In deciding whether the Judge's rulings or conclusions are contrary to law, the Board will consider whether they are contrary to provisions of Executive Order 10865, the Directive, or other applicable federal law. Compliance with state or local law is not required because security clearance adjudications are conducted by the Department of Defense pursuant to federal law. *See* U.S. Constitution, Article VI, clause 2 (Supremacy Clause). *See, e.g.*, ISCR Case No. 00-0423 (June 8, 2001) at p. 3 (citing Supreme Court decisions).

When an Administrative Judge's factual findings are challenged, the Board must determine whether "[t]he Administrative Judge's findings of fact are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record. In making this review, the Appeal Board shall give deference to the credibility determinations of the Administrative Judge." Directive, Additional Procedural Guidance, Item E3.1.32.1. The Board must consider not only whether there is record evidence supporting a Judge's findings, but also whether there is evidence that fairly detracts from the weight of the evidence supporting those findings, and whether the Judge's findings reflect a reasonable interpretation of the record evidence as a whole. Although a Judge's credibility determination is not immune from review, the party challenging a Judge's credibility determination has a heavy burden on appeal.

When an appeal issue raises a question of law, the Board's scope of review is plenary. *See* DISCR Case No. 87-2107 (September 29, 1992) at pp. 4-5 (citing federal cases).

If an appealing party demonstrates factual or legal error, then the Board must consider the following questions:

Is the error harmful or harmless? *See, e.g.*, ISCR Case No. 00-0250 (July 11, 2001) at p. 6 (discussing harmless error doctrine);

Has the nonappealing party made a persuasive argument for how the Administrative Judge's decision can be affirmed on alternate grounds? *See, e.g.*, ISCR Case No. 99-0454 (October 17, 2000) at p. 6 (citing federal cases); and

If the Administrative Judge's decision cannot be affirmed, should the case be reversed or remanded? (Directive, Additional Procedural Guidance, Items E3.1.33.2 and E3.1.33.3).

Appeal Issues

1. Whether the Administrative Judge's conclusion that Applicant's alcohol abuse had been mitigated was arbitrary, capricious or contrary to law. The Administrative Judge found: (a) that Applicant had six alcohol-related offenses; (b) these offenses occurred in 1985, 1987, 1989, 1990, 1992 and 2001 (the last offense occurred in November of that year); and (c) following the last offense, Applicant attended outpatient treatment for alcohol dependence for six weeks followed by participation in a continuing care program. The Administrative Judge concluded that there was no evidence of alcohol-related offenses or occurrences in over two years since Applicant began his treatment program, the problem occurred a number of years ago and there is no indication of a recent problem,⁽¹⁾ and Applicant exhibited positive changes in behavior supportive of sobriety.⁽²⁾

On appeal, Department Counsel asserts that the Administrative Judge's conclusions were arbitrary, capricious and contrary to law because he erroneously applied the two Guideline G mitigating conditions mentioned previously and because he failed to apply Guideline G Disqualifying Condition E2.A7.1.2.5.⁽³⁾ Department Counsel argues, in essence, that Applicant's two- year period of abstinence and his completion of alcohol treatment programs is insufficient to overcome the government's security concerns that result from Applicant's nearly twenty-year history of alcohol incidents. Department Counsel's arguments fail to establish that the Judge's conclusions were arbitrary, capricious, or contrary to law.

Department Counsel does not argue that Guideline G Mitigating Condition E2.A7.1.3.2. is inapplicable to this case. Rather, Department Counsel appears to be challenging the weight that the Administrative Judge assigned to the evidence in mitigation. As the trier of fact, the Judge had to weigh the evidence as a whole and decide whether the favorable evidence outweighed the unfavorable evidence or vice versa, and whether Applicant had satisfied his burden

of persuasion under Directive, Additional Procedural Guidance, Item E3.1.15. Department Counsel's disagreement with the Judge's weighing of the evidence is not sufficient to demonstrate the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law. Regarding Guideline G Mitigating Condition E2.A7.1.3.3, Department Counsel argues that Applicant has not presented evidence sufficient to support the application of that mitigating condition. A review of the entire record convinces the Board that there was sufficient record evidence to permit the Judge to apply the mitigating condition. The Judge's conclusion that Applicant had successfully mitigated his history of alcohol abuse reflects a plausible, legally permissible interpretation of the record evidence as a whole.

Department Counsel asserts the Judge erred when he failed to apply Guideline G Disqualifying Condition E2.A7.1.2.5. (Habitual or binge consumption of alcohol to the point of impaired judgment). In this case, given the sparse record with no evidence of the extent or pattern of any alcohol abuse on the part of Applicant other than the six incidents alleged, it was not arbitrary or capricious for the Administrative Judge not to apply the disqualifying condition. *See, e.g.*, ISCR Case No. 01-22403 (September 5, 2002) at p. 3 (the existence of a pattern of episodic alcohol abuse without more does not require the Judge to apply Guideline G Disqualifying Condition E2.A7.1.2.5). Department Counsel fails to articulate how the Judge's failure to apply Guideline G Disqualifying Condition E2.A7.1.2.5 constitutes error in this case.

2. Whether the Administrative Judge erred by applying Guideline E Mitigating Condition E2.A5.1.3.1. The Administrative Judge concluded Guideline E Mitigating Condition E2.A5.1.3.1⁽⁴⁾ applied because the information Applicant did not disclose on a security clearance application was not pertinent to a determination of trustworthiness. Department Counsel persuasively contends the Judge erred by applying that mitigating condition.

Security clearance adjudications are not limited to consideration of an applicant's present circumstances. To the contrary, an applicant's security eligibility requires consideration of the applicant's present conduct and circumstances in light of the applicant's past conduct and circumstances. *See* Directive, Section 6.3 and Adjudicative Guidelines, Item E2.2.1. *See also Department of Navy v. Egan*, 484 U.S. 518, 528-529 (1988). Although the Administrative Judge might conclude Applicant's history of alcohol abuse was extenuated or mitigated for purposes of Guideline H (Alcohol Consumption), it was arbitrary and capricious for the Judge to declare Applicant's past alcohol-related incidents as not being pertinent to a determination of Applicant's current security eligibility. Applicant's overall history of alcohol abuse, not just his most recent instances of alcohol abuse, was pertinent and relevant to evaluating his security eligibility. *Cf.* ISCR Case No. 98-0582 (November 12, 1999) at pp. 4-5 ("Furthermore, under the whole person concept, the entire history of Applicant's drug abuse, not merely the most recent period of that drug abuse, must be considered in evaluating Applicant's security eligibility."). Accordingly, the Judge erred by applying Guideline E Mitigating Condition E2.A5.1.3.1. However, that error is harmless because it is not outcome determinative in this case.

3. Whether the Administrative Judge erred by finding Applicant did not falsify a security clearance application. The Administrative Judge found that Applicant did not falsify a security clearance application that he completed in April 2002. The Judge based that finding on his acceptance of Applicant's explanation for why he did not list all his alcohol-related offenses. Department Counsel contends the Judge erred because: (a) Department Counsel established a *prima facie* case of falsification; (b) the Judge failed to consider relevant evidence; (c) the Judge offered an explanation for his finding that runs contrary to the record evidence; and (d) the Judge should have resolved doubts against Applicant and in favor of the national security. For the reasons that follow, the Board concludes Department Counsel's arguments lack merit.

Department Counsel has the burden of presenting evidence to prove controverted allegations. *See* Directive, Additional Procedural Guidance, Item E3.1.14. In this case, Applicant denied that he falsified the security clearance application. Accordingly, Department Counsel had the burden of proving falsification. There is no dispute that Applicant did not disclose all his alcohol-related offenses when he completed the security clearance application. However, proof of Applicant's omission, standing alone, does not establish or prove Applicant's intent or state of mind when he completed the security clearance application. Rather, the Administrative Judge had to consider whether, given the record evidence as a whole, there is direct or circumstantial evidence concerning Applicant's intent or state of mind when he completed the security clearance application.

Given the record evidence in this case, proof of Applicant's omission shifted the burden of persuasion to Applicant to present credible evidence to explain the omission sufficiently to negate a finding of knowing and deliberate falsification.

However, Department Counsel's establishment of a *prima facie* case did not foreclose the possibility that Applicant could present credible evidence of an explanation that rebutted or negated the inference that he falsified the security clearance application. *See* ISCR Case No. 97-0184 (June 16, 1998) at pp. 5-6 (rejecting an appeal argument by Department Counsel that was similar to the one made in this case). Given the record evidence in this case, the Board need not agree with the Judge to conclude it was legally permissible for the Judge to decide that Department Counsel established a *prima facie* case under Guideline E, but that Applicant presented credible evidence that rebutted or overcame Department Counsel's *prima facie* case.

There is a rebuttable presumption that an Administrative Judge considered all the record evidence unless the Judge specifically states otherwise. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 2. That presumption is not rebutted or overcome just because Department Counsel believes the Judge should have rejected Applicant's explanation for not listing all his alcohol-related offenses when he completed the security clearance application. Because it is not uncommon for the parties to disagree on how the record evidence should be weighed in a given case, there would be few cases where the rebuttable presumption that the Judge considered all the record evidence would not be rebutted or overcome if the Board accepted Department Counsel's argument.

Department Counsel correctly notes that it would be arbitrary and capricious for the Administrative Judge to offer an explanation for his decision that runs contrary to the record evidence. However, the Judge's finding of no falsification does not run contrary to the record evidence in this case. Given the record evidence in this case, the Judge could have accepted or rejected Applicant's explanation. The Board need not agree with the Judge's choice to conclude it was a legally permissible one in light of the particular record evidence in this case.

Department Counsel correctly notes that under the "clearly consistent with the national interest" standard, an Administrative Judge should resolve doubts about an applicant's security eligibility in favor of the national security, not in favor of the applicant. *See* Directive, Adjudicative Guidelines, Item E2.2.1; *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988). However, Department Counsel fails to articulate how the Judge's decision in this case violates or otherwise transgresses that principle.

For all the foregoing reasons, the Board concludes Department Counsel has not demonstrated the Administrative Judge's finding of no falsification is not sustainable.

Conclusion

Department Counsel has not met its burden of demonstrating harmful error below. Therefore, the Board affirms the Administrative Judge's favorable security clearance decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

1. Guideline G Mitigating Condition E2.A7.1.3.2.
2. Guideline G Mitigating Condition E2.A7.1.3.3.
3. "Habitual or binge consumption of alcohol to the point of impaired judgment."
4. "The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability."